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International Law

Questions

2020

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TRUE/FALSE QUESTIONS

2018 SEMESTER 1 ASSIGNMENT

1. In order for an entity to qualify as a state, it must have a permanent population amongst other requirements).

   True: The requirements are listed in the Montevideo Convention, and they are discussed in page 39 of Strydom.

2. If a state is recommended for UN membership by the Security Council, the General Assembly must decide on admission of that state by a simple majority of the voting members.

   True: See page 58 of Strydom.

3. In terms of article 38(1)(d) of the ICJ Statute, international conventions are subsidiary means for the determination of the rules of law.

   False: Article 38(1)(d) of the ICJ Statute lists judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. See also Strydom page 65.

4. A *jus cogens* norm of international law is a peremptory norm from which no derogation is permitted.

   True, see Article 53 of the Vienna Convention.

5. Article 4(2) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

   False: Article 2(4) deals with the prohibition of the threat or use of force against the territorial integrity of another state; whilst Article 4(2) deals with the role of the General Assembly and the Security Council in the admission of a state into the United Nations.

6. In terms of the 2001 ILC Draft Articles on the Responsibility of States for internationally wrongful acts, necessity may never be invoked as a ground for precluding wrongfulness.

   False: In terms of Article 25(1) of the Draft Articles provides that necessity may only be invoked as a ground for precluding wrongfulness in the act complained of was the only way for the state to safeguard an essential interest against a grave and imminent peril, and if the act did not seriously impair an essential interest of the state, or of the international community as a whole. See also Strydom page 120.

7. In the Bosnia Genocide case the ICJ held that for the conduct of private persons to be attributable to the state, that conduct must be based on general instructions given to such persons by the state.

   True: See para 406 of the ICJ judgment – "a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed". See also Strydom page 127.

8. In terms of article 31 of the 2001 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

   True: See page 131, Strydom.

9. In terms of international law, a state is under a legal obligation to exercise diplomatic protection on behalf of a national who has been injured abroad.

   False: The state has a right, rather than a duty. See pages 140 – 141 Strydom.

10. The ICJ has competence to decide contentious cases between states.

True

11. In terms of the UN Charter, the General Assembly of the United Nations has a primary responsibility for the maintenance of international peace and security.

    False: Article 24(1) of the UN Charter confers that responsibility on the UNSC.

12. The right of state to act in self-defence is provided for in article 51 of the UN Charter.

    True

13. The principle of territoriality entails that a state has jurisdiction over acts committed in its territory.

    True: See Strydom page 242.

14. The International Criminal Court has universal jurisdiction.

    False: The Rome Statute does not provide for universal jurisdiction. See Strydom page 415.

15. In terms of the 1981 Foreign States Immunities Act, foreign states enjoy absolute immunity from the jurisdiction of South African courts.

    False

2018 SEMESTER 2 ASSIGNMENT

1. The United Nations organisation was established at the end of the First World War.

   False

2. In terms of the constitutive theory of recognition, a new state exists when it meets the criteria for statehood, and the recognition of other states is irrelevant.

   False

3. Membership of the United Nations is open to states only.

   True

4. The 1969 Vienna Convention on the Law of Treaties is a codification of customary international law.

   True

5. In terms of section 231 of the Constitution of South Africa, 1996, customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

   False

6. In terms of section 39 (1) of the Constitution of South Africa, 1996, courts must consider international law when interpreting the Bill of Rights.

   True

7. In terms of section 231 of the Constitution, a self-executing agreement binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within reasonable time.

   False

8. A state has jurisdiction over foreigners who perform an act inside the state, which endangers the safety of the state.

   True

9. In terms of article 2(4) of the UN Charter, member states must settle their disputes by peaceful means.

   False

10. In terms of article 38(1) of the Statute of the International Court of Justice, international customary law consists of general state practice only.

    False

11. Functional immunity provides absolute immunity of the person of certain officeholders while they carry out important representative functions.

    False

12. Diplomats are immune from the criminal jurisdiction of the host state.

    True

13. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, regardless of where the crime was committed, the nationality of the accused, or any other connection to the state exercising such jurisdiction.

    True

14. Jurisdiction is the capacity (power) of a state to exercise its legislative, judicial, executive and enforcement functions within a specific territory.

    True

15. In terms of the passive personality principle, a state has jurisdiction over an individual who is a national of that state.

    False

2019 SEMESTER 1 ASSIGNMENT

1. Two sources of international law include custom and jus cogens.

   False: Article 38 of the ICJ statute lists custom, treaties, general principles and scholarly writings as sources of international law.

2. For a state to meet the requirements of statehood contained in the Mondevideo Convention, it must have a minimum of 10 000 inhabitants.

   False: The Montevideo Convention requires a permanent population and does not stipulate a minimum or maximum size. See Strydom 36 – 42.

3. In terms of the Statute of the International Court of Justice, individuals whose human rights are violated by government agents can approach the court for redress.

   False: The ICJ Statute stipulates that the court only has jurisdiction over states. See article 34(1) of the Statute which provides that: "Only states may be parties in cases before the Court".

4. Depending on the circumstances of each case, a state is permitted to derogate from a norm of jus cogens if doing so would be in the interests of justice.

   False: States cannot 'contract out' of jus cogens – such a norm is absolutely binding on all states. See Strydom 84; Study Guide 30.

5. In tracing the history and development of international law, regard must only be had to the histories of the Greeks and the Romans, and to some extent, early European nation states.

   False: Africa's contribution also needs to be taken into account as demonstrated by the articles written by Umozurike, Elias and Smith. See pages 2, 3 of the Study Guide.

6. The right of state to act in self-defence is provided for in article 51 of the UN Charter.

   True: The UN Charter provides in article 51 that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…"

7. Territorial jurisdiction means that states are not permitted under international law to prosecute offenders for conduct which occurred outside the state's territory.

   True: Territoriality as a jurisdictional link means that states have a right to prosecute offenders for conduct that occurred on their territory (waters, land and airspace). For a state to prosecute an offender for conduct which occurred outside their territory, some other link must exist, such as passive personality

(victim is a national of that state), nationality (the perpetrator is a national), protective interest (the state is safeguarding some important interest) or even universal jurisdiction. See Strydom 242 – 246; Study Guide 80).

8. In terms of article 35 of the Vienna Convention on the Law of Treaties, a state can only be bound by obligations arising from a treaty if it is a party to that particular treaty.

   True: The Convention provides in article 35 that, "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing".

9. In terms of international law, a state is under a legal obligation to exercise diplomatic protection on behalf of a national who has been injured abroad.

   False: States have a right, not a duty, to exercise diplomatic protection. See page 59 of the Style Guide.

10. Individuals are considered as full subjects of international law.

    False: States, and not individuals, are subjects of international law, since this legal discipline serves to regulate their relations inter se. See page 2 Study Guide.

11. In terms of the UN Charter, the General Assembly of the United Nations has a primary responsibility for the maintenance of international peace and security.

    False: The primary organ charged with maintaining (17) LCP4801/1 peace and security is the Security Council. See pages 16, 69 of the Study Guide; article 24 UN Charter.

12. The principle of universality entails that a state has jurisdiction over acts committed in its territory only.

    False: The principle of universality (otherwise known as universal jurisdiction) allows a state which has no other connection with either the accused, the victim

or the crime to exercise jurisdiction over that crime as an agent of all humankind. See Strydom 250 – 252; Study Guide page 80).

13. The jurisdiction exercised by the International Criminal Court is regarded as complementary to that of domestic courts.

    True: See article 17 of the ICC Statute, which stipulates that the ICC may only be seized of a matter if the state which has jurisdiction over it is either unwilling or unable to proceed with it.

14. The terms diplomatic immunity and diplomatic protection can be used interchangeably and they refer to the safety and security of diplomats.

    False: Diplomatic Immunity refers to protection enjoyed by diplomats by virtue of the offices they hold. This privilege allows them to stay outside the jurisdiction of the courts of domestic foreign courts. Diplomatic protection refers to 'the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to implementation of such responsibility'. See page 59 Study Guide.

15. The International Criminal Court can exercise jurisdiction over matters involving perpetrators who are nationals of states that are not party to the Rome Statute.

    True: Article 13(b) of the Rome Statute permits the UN Security Council to refer matters to the ICC for investigation. Matters referred in this way dispense with the usual requirement of territorial and nationality jurisdictional links. In that regard, the ICC exercises jurisdiction even over perpetrators who are nationals of states that are not party to the Rome Statute. The case of Omar Al Bashir of Sudan is instructive.

2019 SEMESTER 2 ASSIGNMENT

1. The requirement 'a defined territory' in determining statehood means that the territory must have clearly defined borders which are not in dispute.

False: Several states have disputed borders (e.g. South Africa/Swaziland, Israel/Palestine. The dispute in regard to a border does not deprive a state of statehood. The Montevideo Convention only requires what it terms 'defined territory' as a prerequisite for statehood.

2. The capacity to enter into relations as a determining factor for recognition of states means that an aspirant state must be able to trade with all members of the UN.

   False: The requirements is not that an aspirant state must trade with every other state, it is impossible for any one state to achieve that. So long as there is evidence that a state can manage relations with some other state(s), this will suffice for purposes of state recognition.

3. Membership of the United Nations is open to states and international organisations with observer status.

   False: Only states can be members of the UN.

4. Article 2(4) of the UN Charter enjoins member states to refrain from the threat or the use of force in interactions with each other.

   True: Article 2(4) provides that ' All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

5. Chapter VII of the UN Charter regulates the General Assembly's powers to authorise the use of force to maintain international peace.

   False: Chapter VII deals with the UNSC's powers to regulate international relations or maintain international peace through the use of force.

6. In terms of section 39 (1) of the Constitution of South Africa, 1996, courts may consider international law when interpreting the Bill of Rights.

   False: Section 39 clearly states that the courts 'must consider international law'. It is mandatory, not discretionary.

7. The UN Security Council consists of 11 permanent members, plus 5 non-permanent members elected by the General Assembly on a rotational basis.

   False: Article 23 on Composition – 'The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council'.

8. A state has jurisdiction over foreigners who perform an act inside the state, which endangers the safety of the state.

   True: Although the perpetrator is a foreigner, the state retains jurisdiction over all actions taking place in its territory. The fact that the perpetrator is a foreigner will not absolve them.

9. The veto power is also enjoyed by selected members of the General Assembly.

   False: Article only relates to the permanent five members of the UNSC. Article 27 of the UN Charter provides that 'Each member of the Security Council shall have one vote', and that ' Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'. Effectively, a negative vote from any of the permanent five constitutes a veto. Hence members of the UNGA cannot enjoy the veto power.

10. The requirements for the formation of custom in international law are usus and erga omnes.

    False: Article 38 of the ICJ Statute lists general practice (usus), accepted as law (opinio juris) as the two requirements for the creation of custom.

11. In the Arrest Warrant case, it was held that Ministers of Foreign Affairs do not enjoy functional immunity and can be arraigned before foreign domestic courts.

False: The ICJ was clear that a minister of foreign affairs enjoyed immunity before the domestic courts of a foreign country.

12. Senior state officials and heads of states are immune from the criminal jurisdiction of an international tribunal such as the ICC.

    False: It is not established that no such immunity exists in relation to an international court. Further, article 27 of the Rome Statute clearly provides that the status of an individual cannot be used to invoke immunity before the ICC.

13. Universal jurisdiction is criminal jurisdiction based on two factors, (i) the nature of the crime, and (ii) the nationality of the perpetrator.

    False: For the universality principle, the nationality of the perpetrator is of not significance. All that is required is that the state exercising jurisdiction does so as an agent of humankind, and that the crime that the individual is charged with falls within the category of international crimes (crimes against humanity, war crimes, genocide, piracy, slave trading, etc)

14. Jurisdiction is the capacity (power) of a state to exercise its legislative functions only within a specific territory.

    False: Jurisdiction is wider than this. It includes legislative, judicial and enforcement jurisdiction; and it extends, where appropriate to acts occurring outside its territory, provided that state's interest is affected.

15. In terms of the effects principle, a state has jurisdiction over an individual who is a national of that state.

    False: To exercise jurisdiction on the basis of the effects principle, an individual need not necessarily be a national of the state of jurisdiction. All that is required is that the individual, whatever his nationality, committed the act complained of outside the territory of the state, but its effects are felt within the state now exercising jurisdiction.

ESSAY QUESTIONS

2018 SEMESTER 1 ASSIGNMENT

Question

Write an essay in which you discuss the history and development of public international law. [25]

In this assignment we were looking for the following:

1. Your knowledge and understanding of the history and development of international law in general.
2. Your ability to differentiate between the all four periods of this development;
3. Your ability to synthesise information coherently and logically.

We were also mindful of the fact that each student had an individual and unique approach to the assignment question and that the length of your assignment was limited. The information below is therefore not a model answer, nor a comprehensive or an exhaustive one: It is simply an example of some of the issues, which you could have mentioned:

Unisa's Suggested answer:

> Your answer should have covered the following, as detailed in Strydom pages 5 to 31.
>
> You were expected to cover the period that characterised the beginnings of the modern state system; the period from the 1500s to 1648; the emergence of modern Europe and its accompanying economic expansion and socio-political transformations. Your answer should have included a discussion of the Westphalian model, sovereign equality of states and respect for their independence as well as the contribution of eminent writers of the time, such as van Bynkershoek, Grotius etc.
>
> The next era in your discussion should have been the period from 1648 to 1815 which was characterised by conflict between the three new powers in Europe, namely the Netherlands, Britain and France.
>
> This would be followed by the period from 1815 to 1914 which was characterised by occupation of African territories by European forces and the legitimation of this by the Berlin Conference. This discussion would be followed by the period after the First and Second World Wars, and how these two major occurrences shaped international law.

2018 SEMESTER 2 ASSIGNMENT

Question

Write an essay in which you discuss the requirements for statehood as contained in the 1933 Montevideo Convention on the Rights and Duties of States. [25]

In this assignment we were looking for the following:

1. Your knowledge and understanding of the concept of statehood.
2. Your ability to determine the source(s) of these different elements of statehood;
3. Your ability to synthesise information coherently and logically.

We were also mindful of the fact that each student had an individual and unique approach to the assignment question and that the length of your assignment was limited. The information below is therefore not a model answer, nor a comprehensive or an exhaustive one: It is simply an example of some of the issues, which you could have mentioned:

Unisa's Suggested answer:

> Your answer should have covered the following, as detailed in Strydom pages 42 to 55.
>
> You were expected to cover show an understanding of the elements contained in the Montevideo Convention for determining statehood. You were also expected to use case lase, such as the Western Sahara case, and live cases of border disputes, such as the Swaziland – South Africa border disputes. Reference to authority or lack thereof was also taken into account.

2019 SEMESTER 1 ASSIGNMENT

Question

Write an essay, in which you discuss the contribution of Africa to the history and development of public international law. [25]

In this assignment we were looking for the following:

1. Your knowledge and understanding of the history and development of international law in general.
2. Your ability to differentiate between the all four periods of this development;
3. Your ability to synthesise information coherently and logically.

We were also mindful of the fact that each student had an individual and unique approach to the assignment question and that the length of your assignment was limited. The information below is therefore not a model answer, nor a comprehensive or an exhaustive one: It is simply an example of some of the issues, which you could have mentioned:

Suggested answer:

Your answer should have covered the following, as detailed in Strydom pages 5 to 31.

You were expected to cover the period that characterised the beginnings of the modern state system; the period from the 1500s to 1648; the emergence of modern Europe and its accompanying economic expansion and socio-political transformations. Your answer should have included a discussion of the Westphalian model, sovereign equality of states and respect for their independence as well as the contribution of eminent writers of the time, such as van Bynkershoek, Grotius etc.

The next era in your discussion should have been the period from 1648 to 1815 which was characterised by conflict between the three new powers in Europe, namely the Netherlands, Britain and France.

This would be followed by the period from 1815 to 1914 which was characterised by occupation of African territories by European forces and the legitimation of this by the Berlin Conference. This discussion would be followed by the period after the First and Second World Wars, and how these two major occurrences shaped international law.

Having done that, you were expected to use the articles on decolonisation of international law (third world approaches to international law) to debunk, criticise and analyse whether Strydom and other scholars have provided an accurate picture of the history and politics of international law development.

Assignments, being research-oriented in their nature, required that students read widely, analyse content critically and not to just cut and paste what a few authors have written.

2019 SEMESTER 2 ASSIGNMENT

Using the Arrest Warrant Case as a point of departure, write an essay in which you discuss the concept of immunity of senior state officials (Ministers of Foreign Affairs in particular) under international law. [25]

In this assignment we were looking for the following:

1. Your knowledge and understanding of the immunity in general under international law.
2. Your ability to differentiate between functional and personal immunity.
3. Your ability to discuss the main findings of the ICJ in the case.

We were also mindful of the fact that each student had an individual and unique approach to the assignment question and that the length of your assignment was limited. The information below is therefore not a model answer, nor a comprehensive or an exhaustive one: It is simply an example of some of the issues, which you could have mentioned:

Suggested answer:

The assignment question required students to discuss the concept of immunity of a senior state official in general, under international law, using the Arrest Warrant case as a point of departure. In your discussion there was a need for a clear explanation on what immunity is. Further, it was important for your discussion to include the main findings of the court. Essays that did not do this were penalised. It was imperative to discuss personal and functional immunity; and the fact that the immunity enjoyed by ministers of foreign affairs applies regardless of whether the minister is on foreign territory in an official or private visit.

Aim of immunity was to allow heads of states (HOS) to conduct international relations smoothly.

• Provides for the inviolability of the person and premises of a foreign state's representatives.

• Also provides for immunities from the exercise of jurisdiction over those representatives.

• Premised on sovereign equality (principle of state sovereignty).

Two forms of immunity: personal and functional.

• Provided for by both customary law and Vienna Convention on the Law of Treaties.

• Personal immunity is absolute, covers both private and public acts committed by officials.

• Functional immunity relates to conduct carried out on behalf of a states. It is more commonly used in civil cases.

• Functional immunity, unlike personal immunity, does not attach to all conduct performed by state officials.

• Arrest Warrant Case (ICJ) – certain holders of high ranking office in a state, such as the HOS, head of government, and minister of foreign affairs enjoy personal immunity.

Questions before the ICJ:

i. Did Belgium violate principles of customary international law concerning the absolute inviolability and immunity from criminal process of an incumbent Foreign Minister, when it issued and internationally circulated the arrest warrant?

ii. If yes, did it violate the principle of sovereign equality amongst States;

iii. does this alleged unlawfulness preclude States who received the warrant from exercising it;

iv. should the Court order reparations; and

v. should Belgium recall and cancel its arrest warrant?

Court Decision: The issuance and circulation of the arrest warrant violated Belgium's international obligations towards the Congo. Belgium failed to respect, and infringed, Yerodia's immunity and the inviolability enjoyed by him under international law.

Relevant Findings of the Court:

1. It is an established principle of international law that Heads of States and Governments, Foreign Ministers and Diplomatic and Consular agents enjoys immunities from civil and criminal jurisdictions of other States.

2. In the absence of treaty law, customary international law determines the immunities of Ministers of Foreign Affairs. These immunities "…are not given for their personal benefit; but to ensure the effective performance of their functions of behalf of their…States". The functions of the Foreign Minister require frequent travel to other countries. International law recognizes him as a representative of the State solely by virtue of his office. The functions of a Foreign Minister are such that – during his tenure – he enjoys absolute immunity from criminal jurisdiction and inviolability when he is abroad.

3. As the incumbent Foreign Minister, Yerodia enjoys immunity (during his tenure) for acts performed, both, in an official capacity and in a private capacity. The immunity applies regardless of whether the Minister is on foreign territory in an official or private visit. This immunity extends not only to his actions during his tenure; but, also to his actions before he became Foreign Minister.

"*Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious…. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions."*

4. The Court rejected Belgium's argument that the Minister does not enjoy immunity because he is accused of having committed war crimes or crimes against humanity. (Belgium relied on the Pinochet Case (decided by the House of Lords, UK), the Qaddafi Case (decided by the French Court of Cassation) and Statutes of International Criminal Court and Tribunals.) The Court held that there was no exception in customary international law to the absolute immunity of an incumbent Foreign Minister.

" *It (the Court) has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, when they are suspected of having committed war crimes or crimes against humanity…The Court has also examined the rules concerning*

the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable … It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts."

5. International Conventions give jurisdiction to national Courts over various crimes and, at times, requires them to exercise this jurisdiction [for example, the Torture Convention]. This requirement does not affect the immunities given to Foreign Ministers under international law. Despite international conventions establishing domestic jurisdiction, Foreign Ministers are immune before foreign courts.

6. Immunity does not mean impunity. The person continues to be individually responsible for the crime he committed.

"*While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility…."*

7. The Court set out four situations where an incumbent or former Foreign Minister could be prosecuted:

> a) Prosecution in his own country according to the domestic law (the international law of immunity is not recognized before a person's national courts);
>
> b) If his country waives his immunity, then prosecution before a foreign court;
>
> c) Once he ceases to be the Foreign Minister, he no longer enjoys immunity before foreign courts for private acts committed during his tenure as Foreign Minister; and for all acts committed before or after his tenure in office; and
>
> d) Prosecution before an international criminal body, with the necessary jurisdiction (for example the ICC).

8. The ICJ concluded that the issuance and circulation of the arrest warrant violated Belgium's obligations towards Congo, "in that it failed to respect the immunity of that Minister and, more particularly infringed the immunity from criminal jurisdiction and the inviolability enjoyed by him under international law." It did not matter that Yerodia was never arrested.

"*Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant… could have resulted, in particular, in his arrest while abroad. The Court observes… Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the*

arrest warrant issued against him by Belgium"… the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes"'.

EXAM QUESTIONS

2018 JUNE EXAM – PAPER 1

Question 1

Prior to the official establishment of the various entities within the Former Yugoslavia's territory, the Serbs in Bosnia controlled an area which they called "Republica Srpska" They proceeded to drive out Muslims and Croats and make "Republic Srpska" a "purely" Serbian entity within Bosnian territory "Republica Srpska" was alleged to be in control of a defined territory, to have a permanent population, to have its own currency, and to have even concluded international agreements If this case had to come before you as a judge, would you have concluded that "Republica Srpska" was, or was not, a state? Answer the question by discussing the criteria for statehood as contained in the 1933 Montevideo Convention on the Rights and Duties of States **[25]**

Question 2

Section 231(4) of the South African Constitution refers to the concept of 'self-executing' treaties Through a thorough analysis of applicable case law, explain whether and to what extent this concept is suitable in the South African context **[25]**

Question 3

Write an essay in which you explain whether states are obliged to exercise diplomatic protection when circumstances require it In your essay you must differentiate between a potential right within international law, and a potential right/obligation arising as a result of the Constitution of the Republic of South Africa, 1996 You must substantiate your answer fully with reference to appropriate legal authority **[25]**

Question 4

Paul is a UK citizen and an international terrorist He is wanted in many countries, including New Zealand where he has lawful residency The New Zealand authorities uncover his involvement in a plot to assassinate the new Prime Minister Paul flees New Zealand and enters South Africa The South African police discover him hiding in a small town, close to the Mozambican border Paul manages to run from the police, and reaches the border During the operation to capture him, Pauls starts shooting indiscriminately and fires a round across the border into Mozambique, which kills a French tourist on holiday in Mozambique

4.1

List and define the bases of jurisdiction under international law (10)

4.2

Identify which of the countries mentioned above are reliable to exercise jurisdiction over Paul In each instance, state the crimes for which they can exercise such jurisdiction, and the bases upon which they are able to exercise jurisdiction Refer to applicable authority in your answer (15)
[25]

Additional questions (Questions from the previous curriculum that are still relevant are included**)**

Question

Indicate whether the following statements are true or false, and briefly explain why

1 1 In terms of section 231(2) of the 1996 Constitution, treaties become part of South African law once they have been approved by a resolution in both the National Assembly and the National Council of Provinces (3)

1 2 A self-executing treaty is on which does not require ratification or accession in order to bind the Republic on the international plane (3)

1 3 Customary international law is not foreign law, it is law in the Republic and, as such, courts may take judicial notice of it (3)

1 4 As a result of the provisions of section 39(2) of the Constitution, international law is never relevant in cases where the court is charged with the development of our common law (3)

1 5 In terms of section 39(1) of the Constitution, only binding international law may be considered in the interpretation of the Bill of Rights (3)

Question

Explain the formation of customary international law and *ius cogens* norms as sources of international law focusing on the relationship between these two concepts **[25]**

Question

Following the fall of the Soviet Union, a large-scale civil war erupted in the Socialist Federal Republic of Yugoslavia The outcome of this conflict was the fragmentation of the former Yugoslavia into multiple "new" smaller states Among these, the Republic of Serbia was created, who to this day claims the semi-autonomous region of Kosovo as one of its provinces On 17 February 2008, the elected leaders of Kosovo issued a unilateral declaration of independence Both the United States of America and the United Kingdkom formally recognised Kosovo as a state the day after the unilateral declaration fo independence To date, more tha half of the international community of states recognise Kosovo as a state However, they are yet to be afforded collective recognition by the United Nations (UN)

1 The NGO Human Rights for the People (HRP) tasks you, a leading international law expert, to determine whether the state of Serbia is bound, as a successor to Yugoslavia, by the International Convention for the Protection of Human Rights, a multilateral treaty which Yugoslavia ratified on 2 October 1982 (10)

2 Which objective criteria of statehood should Kosovo comply with I order to receive the collective recognition from the UN they so desperately seek? (10)

3 Pursuant to article 65 of the Statute of the International Court of Justice (ICJ), ob 8 October 2008, the General Assembly of the UN posted the following question to the ICJ for its consideration in an advisory opinion "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" Briefly discuss the advisory opinion that the ICJ delivered in respect of this matter on 22 July 2010 (5)

[25]

Question

In the *Nicaragua case* (*Nicaragua v United States of America*), amongst other issues, the International Court of Justiced (ICJ) was tasked with deciding whether the extent of support that the United States lent to the Contras (a militia group which at the time actively engaged in hostilities with the government of Nicaragua) was of such a nature that the alleged violations by the Contras could be imputed/attributed to the United States On this issue the ICJ held

For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed [para 115]

Write an essay in which you discuss the following two issues 1) what the potential implications would be should the conduct of the Contras be imputed/attributed to the United States, and 2) how the test of such immutability/attribution, expressed as the 'effective control" test in the *Nicaragua case*, has developed in international law, and what the preferred test or standard is at present **[25]**

2018 JUNE EXAM – PAPER 2

Question 1

Prior the official establishment of the various entities within Former Yugoslavia's territory, the Serbs in Bosnia controlled an area which they called 'Republica Srpska' They proceeded to drive out Muslims and Croats and make 'Republica Srpska' a 'purely' Serbian entity within Bosnian territory Republica Srpska was alleged to be in control of a defined territory, a permanent population, to have its own currency, and to even have concluded international agreements If this case had come before you as a judge at the International Court of Justice, would you have concluded that Republica Srpska was a state? Substantiate your answer **[25]**

Question 2

Through an analysis of South African case law, discuss fully what is meant by diplomatic protection, when the need for this protection may arise, what forms the protection can take, whether the state can be compelled to render such assistance, and if so - the extent of this obligation **[10]**

Question 3

In the *Lotus* case (*France v Turkey*) 1927 PCIL Rep Ser A no 10, a French tanker (the Lotus) collided with a Turkish tanker (the Boz-Kourt) on the high seas

Eight Turkish soldiers were killed When the Lotus docked at Constantinople, the French officer who was the lookout at the time of the collision was charged with culpable homicide in the Turkish courts Called upon to decide on the issue of jurisdiction, the Permanent Court of International Justice (PCIJ) held that

"The rules of international law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law "

Using Article 38 of the Statute of the International Court of Justice, can you recognise the two sources of international law identified in this quotation? Under which sections of article 38 of the Statute of the ICJ would you classify each source? **[25]**

Question 4

In November 2012 the United Nations General Assembly passed a resolution changing the status of Palestine from an "observer entity" to a "non-member observer state" within the United Nations system Susan Rice (the U S Ambassador to the U N) told the Assembly "This resolution does not establish that Palestine is a state " You have been tasked by the South African government to write a legal opinion on whether or not Palestine has become an independent state in light of the requirements for statehood in international law **[25]**

Question 5

Table the difference between international and national law **[15]**

Additional questions (Questions from the previous curriculum that are still relevant are included)

Question

Explain whether the rule *nemo iudex in sua causa* applies in international adjudication Substantiate your answer (5)

Question

The state of Medonesia is a developing state Its government is to a large extent subservient to that of the state of Powerasia, on which it depends for economic aid The Gangasta Rebels are a well-organised militant group, operating within Medonesia, who have been planning a coup against the Medonesian government for years The coup is successful, and in February 2009 the Gangasta Rebels proclaim themselves the governing authority of Medonesia The Gangasta government harbours very strong anti-Powerasia sentiments, and relations between the two states become hostile In the meantime counter-insurgents within Medonesia start organising themselves for a strike against the Gangasta government Powerasia secretly promotes the anti-Gangasta civil dissidents by supplying them with weapons and training

Analyse this situation and write a legal opinion explaining whether Powerasia has violated any rules of international law, and if so, what Medonesia's remedies would be (15)

Question

Answer the following questions on jurisdiction in international law

(a) Miss Aim stands on the banks of the Orange River in Namibia and fires a warning shot at a poacher in Namibia The shot goes awry and hits Ms BD Luck, who is standing on the opposite bank of the river in South Africa watching the events Explain clearly whether Namibia and/or South Africa will have jurisdiction, and on what bases (4)

(b) Ms PS Port leaves her home country, X, on holiday, and while visiting country Y, murders a fellow citizen of X in Y's territory Explain whether X can exercise jurisdiction over Ms PS Port, and if so, on what basis (2)

(c) Mr T Reason, a British citizen living in England, plots to bring down the government of South Africa by introducing a new strain of cholera into the country's drinking water Explain whether South Africa may exercise jurisdiction over Mr T Reason and if so, on what basis (2)

(d) Mr D Evil, an acknowledged war criminal, is hunted down by outside agents and found in the peace-loving country, Idyll Explain whether a third party state, not connected to Mr D Evil in any way, could exercise jurisdiction over Mr D Evil, and if so, on what basis (2)

(10)

Question

John Dugard *International law a South African perspective* (3ed at 34) states

'The extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate "

Discuss fully, with reference to the requirements of custom and case law, whether United Nations resolutions can give rise to binding customary international law (10)

Question

Compare the acquisition of international legal personality by a state and by an international organisation (5)

Question

Compare the role of international law in the interpretation of South African law in terms of sections 39 and 233 of the Constitution of the Republic of South Africa 1996 (10)

Question

South Africa and Switzerland conclude a treaty through the exchange of notes In terms of the treaty Switzerland agrees to make 10 million euros available to the South African Department of Health for the purchase of antiretroviral drugs to be used in the fight against aids in rural communities

In terms of the treaty, the Swiss Ministry of Health will transfer funds to the South African Department of Health on receipt of a substantiated request from the SA Minister of Health in which specific rural clinics needing antiretrovirals are identified The SA Minister identifies the Helen Suzman Clinic in rural KwaZulu-Natal as such a clinic

Using this as a practical example, discuss fully the operation and effect of the treaties in terms of sections 231(2), (3) and (4) of the Constitution (15)

Question

An increasingly important question in the South African law relating to state responsibility, is whether or not the state has a duty, enforceable by the courts, to provide diplomatic protection to its nationals who suffer harm in the territory of some other state

With reference to the literature and case law prescribed as compulsory material for this topic, explain what is meant by diplomatic protection, and discuss the varying approaches adopted by the South African courts to this issue **[25]**

2018 OCTOBER EXAM

Question 1

1 1 Indicate whether each of the following statements is true or false You must substantiate your choice in each instance

1 1 1 Individuals (natural persons) are subjects of international law (3)

1 1 2 The primary sources of international law are judicial decisions of national courts only and the teachings of the most highly qualified publicists (3)

1 1 3 Where a foreigner from State X violates the rights of a nationals from State Y inside a marine vessel sailing on the high seas, but registered in State Y, none of these two states can claim jurisdiction over the perpetrator (3)

1 1 4 The reference to 'territory' in the requirements of statehood set out in the Montevideo Convention on the Rights and Duties of States 1993 only relates to land of a size to be determined by the United Nations (3)

1 1 5 Although similar in outlook, the ICC and the ICTR are both international tribunals with different mandates and temporal jurisdiction (3)

1 2 Briefly explain the differences AND similarities between international law and national law (10)

Question 2

With reference to *S v Banda & others* 1989 (4) SA 519 (BG), discuss the declaratory and constitutive theories regarding unilateral recognition of states in international law as discussed in the quotes above Include in your discussion the role of such recognition in determining whether a given entity has the capacity to enter into relations with other states, which is an objective requirement for statehood provided for by the Montevideo Convention (1933) That is to say, you have to discuss both unilateral recognition of states and the objective criteria for statehood, and thus the relationship between these issues **[25]**

Question 3

Since its independence in 2011, Africa's newest state, South Sudan, has not enjoyed sustained peace Both government and opposition forces have been engaged in a civil war that has caused the deaths of tens of thousands of people and over 2 million people are currently displaced Reports by the United Nations, African Union (AU) and non-governmental agencies have shown that both government and rebel forces have been involved in atrocities that can be deemed war

crimes, and crimes against humanity This situation has resulted in some calling for intervention through the use of force to stop these crimes
Based on the scenario above, answer the following questions

a) In terms of Article 4(h) of the African Union Constitutive Act, list and briefly explain the grounds for intervention in the affairs of African Union member states (10)

b) If you agree that the AU can intervene through the use of force, discuss whether such intervention requires Security Council authorisation (10)

c) Provide an opinion on the importance of AU intervention in South Sudan (5)
[25]

Question 4

In 2013, South Africa terminated more than five treaties it had with European countries This was a lengthy process between these contracting states because they had to engage in public review before terminating the treaties concerned Strydom asserts that treaties are based on the consent of states, in other words, states consent to be bound by these treaties However, despite their binding nature, states still have a right to exclude the operation of certain aspects of a treaty through a reservation, or to exclude the operation of an entire treaty through withdrawal from a treaty In an essay, with reference to authority, discuss the circumstances in which a treaty can be terminated, as well as the legal effects of a reservation by a state which is unwilling to be bound by a particular provision **[25]**

2019 JUNE EXAM

Question 1

"The foundation of international law (or law of nations) as it is understood today lies firmly in the development of Western culture and political organisation "

- Malcom Shaw (*International Law*)

Critically discuss the validity of this statement by referring to the opinion of critical scholars on the practise of international law and inter-state relations in pre-colonial Africa In your answer, you must provide specific examples of such practise, and the role of colonialism in erasing the reference to such practises from history [25]

Question 2

The states of Ajubaria and Kalakuta are both members of the United Nations (UN) Both states are neighbours and have had a tense relationship for the past 10 years Ajubaria accuses Kalakuta of sponsoring an armed rebel group, "Freedom For Ajubaria", within its territory Ajubaria argued that such action is aimed at installing the rebel movement as a puppet regime under the control of the government of Kalakuta The Kalakuta government insists that its support for the "Freedom For Ajubaria" is a retaliatory act for Ajubaria's continued support for rebel groups within its territory Both countries have refused to meet to discuss their differences, and there are reports that Ajubaria is preparing to invade the territory of Kalakuta in order to "teach the government of Kalakuta some hard lessons and further deter it from interfering in its affairs"

With reference to the scenario above, critically discuss the following

a) **The role of the United Nations in the settlement of disputes** (5)
b) **The prohibition of the use of force under international law.** (5)
c) **State liability under international law.** (10)
d) **Measures that should be put in place in order to prevent outright conflict between both states** (5)

[25]

Question 3

The state of Mpuluzi is a prosperous, almost ethnically-homogenous country nestled in the east equatorial region of Africa Its economy has been steadily growing over the years, attracting economic migrants from some of the neighbouring states with which it shares borders, such as the Republics of Leribe, Giyani and Otse These three latter republics have been battling political instability and have over the years increasingly implemented austerity measures as their economies dwindled Naturally, these developments also led to an increase in anti-government protests and other situations of violence In March 2018, Moses Gigaba, a leader of the Otse Revolutionary Brigade clandestinely entered the Republic of Mpuluzi and detonated a bomb at the Embassy of the Republic of Otse The bomb blast killed 44 people and injured many others Gigaba's revolutionary forces control over half of the southern part of Otse, where they control opium fields used to produce drugs to finance the conflict The opioids they produce are exported abroad to countries including the United Arab Emirates and the neighbouring Republic of Giyani The proceeds are banked safely with the Bank of Dubai

In that week of terror, Gigaba and his revolutionary allies also launched rocket-propelled grenades from within Mpuluzi territory, hitting targets inside Otse In the grenade attacks, the casualty list included nationals of both Otse and Leribe As the uncertainty and violence continued throughout the northern province of Mpuluzi Republic, Gigaba's forces also kidnapped a group of school girls, to use as sex slaves As the violence and the state's response intensified, Gigaba decided to flee Mpuluzi to Dubai, via Mauritius Whilst transiting in Mauritius, he was arrested by the security agents there for possession of cannabis

With reference to case law, advise the Government of Mauritius if it can claim jurisdiction over Gigaba. Further, advise whether there are any other competing claims of jurisdiction in this case

[25]

Question 4 (The cases were not prescribed, but students could answer the questions**)**

Critically discuss the *Democratic Alliance v Minister of International Relations and Co-operation and Others, Engels and Another v Minister of International Relations and Co-operation and Another (58755/17) [2018] ZAGPPHC 534* in the context of immunity under international law In your answer, discuss the following

(1) **Whether foreign heads of states enjoy immunity from jurisdiction generally.** (5)

(2) **Whether such immunity (if any) also covers cases involving murder, assault and other similar offences?** (10)

(3) **Whether the wives (spouses) of foreign heads of states enjoy the same immunity?** (10)

[25]

TOTAL· {100}

2019 OCTOBER EXAM

Question 1

"The existence of a widespread customary law was noticed by early European visitors to Africa, in particular by the Portuguese Traders enjoyed, for example, the protection of law for the unwritten contracts, based on oaths and 'medicine', which they made with the local inhabitants Conversely, they [European traders] resented the application of West African law under which the property of a dead colleague, or their ships gone aground along the coast, were forfeit to the local ruler Thus it seems that customary law, this 'unity in diversity', provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated The evidence which will be cited about these relations derives, as would be expected, mainly from those states which possessed a centralized, or at least a central, authority "

- Robert Smith, 'Peace and palaver International relations in pre-colonial West Africa' *Journal of African History* (1973)

Based on the quotation above, answer the questions below

a) Define international law (2)

b) Provide a brief description of how modern international law often is presented as a European creation (8)

c) With reference to Robert Smith's article, discuss the way in which African customary law shaped the practice of international law in pre-colonial Africa (15)

[25]

Question 2

In April 2016, the Peace and Security Council of the African Union (AU) received the final report of the fact-finding mission of the African Commission on Human and Peoples' Rights to Burundi The report noted that the Burundi government's security personnel and other affiliated groups were involved in grave acts of violence against the civilian population, and recommended that the AU intervene by deploying troops to stop this The AU decided not to intervene, and instead mandated the East African Community (EAC) to engage in mediation efforts The EAC has since failed to stop the continued repression of civilians in Burundi

Based on this scenario, answer the following questions

a) Briefly explain the grounds for intervention under Article 4(h) of the African Union Constitutive Act (10)

b) Does the AU's intervention require Security Council authorisation? Substantiate (10)

c) Provide an opinion on the legal significance of AU intervention in Burundi (5)

[25]

Question 3

The state of Qwaqwa is a prosperous, ethnically almost homogenous country nestled in the east equatorial region of Africa Its economy has been growing steadily over the years, attracting economic migrants from some of the neighbouring states with which it shares its borders, such as the Republics of Matafeni, Gondwana and Yoyika These two latter republics have been battling political instability and have over the years increasingly implemented austerity measures as their economies dwindled Naturally, these developments also led to an increase in anti-government protests and other situations of violence In March 2018, Moses Agrizzi, a leader of the Yoyika Revolutionary Brigade

clandestinely entered the Republic of Qwaqwa and detonated a bomb at the Embassy of the Republic of Yoyika The bomb-blast killed 44 people and injured many others Agrizzi's revolutionary forces control over half of the southern part of Yoyika, where they control opium fields used to produce drugs to finance their conflict with the Yoyika Government The opioids they produce are exported to other countries, including the Islamic State of the East and the neighbouring Republic of Gondwana The proceeds are banked safely with the Bank of the East, headquartered in the Islamic State of the East

During that week of terror, Agrizzi and his revolutionary allies also launched rocket-propelled grenades from within Qwaqwa territory, hitting targets inside Yoyika The casualty list as a result of these rocket-attacks included nationals of both Yoyika and Matafeni As the uncertainty and violence continued throughout the northern province of the Qwaqwa Republic, Agrizzi's forces also kidnapped a group of school girls, to be used as sex slaves As the violence and the state's response to it intensified, Agrizzi decided to flee Qwaqwa to the Islamic State of the East, via the Comoros Whilst transiting in the Comoros he was arrested by the security agents there for possession of cannabis

With reference to case law, advise the Government of the Comoros if it can claim jurisdiction over Agrizzi Advise further whether there are any other competing claims of jurisdiction in this case **[25]**

Question 4

(a) With reference to authority, write a brief narrative on the sources of international law (10)

(b) Answer True or False to the following questions Only write down the words "True" or "False" in your answer book (15)

1 One of the requirements of statehood is that a state must demonstrate the existence of a homogenous, non-nomadic population
2 South Africa is a party to the Vienna Convention on the Law of Treaties
3 To conclude treaties under international law, full powers are required For a young democracy such as South Africa, it shall suffice that the person representing South Africa is a member of the judiciary
4 The primary sources of international law are judicial decisions of national courts and the teachings of the most highly qualified publicists

5 The International Criminal Court can exercise jurisdiction over grave breaches whenever territorial, nationality, passive personality or protective interest jurisdiction exists

6 Diplomatic immunity under international law derives its rules from diplomatic protection

7 In 2014, the African Union established its own international criminal court via the Malabo Protocol, which provides for immunity of heads of states This immunity clause is in line with both international customary law and case law

8 Individuals (natural persons) are subjects of international law

9 In terms of article 38(1) of the Statute of the International Court of Justice, international customary law is made up of a general practice that is accepted as a legal obligation

10 In terms of the monist theory regarding the incorporation of international law into the municipal legal system, international law and national law are seen as part of a single legal system No "acts of transformation" are necessary

11 In terms of section 232 of the Constitution, customary international law is automatically law in South Africa, even if it is in conflict with the Constitution or an Act of Parliament

12 International legal personality denotes the ability of an entity to act independently on the international plane

13 A secondary/derivative international law subject's international legal personality is dependent on the act or will of another international law subject

14 In the public international legal system, precedent forms part of the system in much the same way as in the domestic sphere

15 The Treaty of Westphalia marks the birth of international law as we know it today

[25]

SELF-ASSESSMENTS, LEARNING OUTCOMES AND ACTIVITIES

LEARNING UNIT 1: DEFINING EPOCHS

Learning Outcomes

1. Describe the development of international law, and also the contributions of precolonial African entities to such development
2. Explain the history behind the emergence of the modern state system
3. Explain and analyse the role of international organisations in international law
4. List and explain the differences between national law and public international law
5. Explain the significance of the Westphalian system
6. Define the term 'public international law'

Self-assessment

1. Write an essay in which you define international law and thereafter compare national law to international law.
2. Write an essay about the practice of international law in pre-colonial Africa.

LEARNING UNIT 2: STATEHOOD AND RECOGNITION

Learning outcomes

1. Define the terms "international legal subject" and "international legal personality"
2. Distinguish between primary and secondary international legal subjects
3. Recognise which entities may qualify as subjects of international law
4. Identify the marks of statehood
5. Apply these characteristics to a practical situation
6. Explain and assess the differences between the two theories governing the role of recognition of states within the question of statehood

7. Analyse the effect of the principle of self-determination and the process of decolonisation on the theories of statehood

8. Discuss the United Nations organisation as a subject of international law

9. Explain the requirements and processes prescribed by in the United Nations Charter relating to the membership, suspension and expulsion from the United Nations.

Activity 2.1

Study the characteristics of statehood listed in the Montevideo Convention and discussed by Strydom, and try to answer the following question:

State A is a new state created by the legislative act of its mother state, B. State A is very poor. Its population is largely nomadic, in addition to which some 60% of its adult males are forced by economic necessity to seek employment on the mines in the former mother state. The remainder of the population live in organised tribes under a patriarchal leader along strict hierarchic lines.

The borders of State A have not yet been fully defined since negotiations are still taking place between it and its mother state for the extension of its territory.

One of the territories that currently falls within A is a small enclave completely separated from the main body of its territory. The enclave contains only a fi shing town with a canning factory, a school, a magistrate's court and certain government offices manned partly by officials seconded from State B and partly by local inhabitants of State A who are receiving training from B's officials.

Because the government of State A is virtually bankrupt, it relies heavily on financial assistance from State B. It is, however, actively developing a form of government totally alien to that of B. Although A's Minister of Foreign Aff airs has travelled extensively in an attempt to establish diplomatic relations in Europe, no country other than B and a few neighbouring states that are wholly dependent on A for a route to the sea, have recognised A. A's application for membership of the UN has also been refused.

Discuss fully whether A is a state enjoying international legal personality (statehood).

Unisa's feedback

A was created by mother state B:

It is a perfectly acceptable process in international law for one state to hand over part of its territory to another state or, as in the present case, to create a new state in this way. In terms of the Western Sahara case 1975 ICJ Rep, the fact that State A's population is nomadic does not exclude statehood, provided there is an organised society. The further fact that a large percentage of the population consists of migrant labourers (although different from a nomadic population) does not change the position. The added fact of a strictly organised society lends further credence to accepting the statehood of A. At first glance, then, A could qualify as a legitimate, independent state. Keep th e fact that it is very poor in mind and see if it has any role to play.

A's borders are not fully defined:

Clearly defined borders are not a prerequisite for statehood. Israel's borders have been disputed for a very long time and even South Africa's borders with, for example, Swaziland, are the subject of debate. See also the remarks of the court in the North Sea Continental Shelf case, as discussed by Strydom et al.

A has a small enclave separate from the main territory:

This, too, is not a bar to statehood. Think of Alaska, which is separated from the USA by Canada.

Permanent population:

A nomadic population is not a bar to statehood. In the Western Sahara case the court found that the fact that the population is nomadic does not exclude statehood. Rather than looking at the situation of the population in a specific place, one should consider whether the population lives in accordance with an organised, recognisable social and political structure. If it does the population requirement has been met.

The important point is that the population must have some sort of relationship to the would-be state. See the remarks of Craven and Abbas in this regard, as discussed by Strydom.

Effective government:

The question is whether there is 'a system of government in general control of its territory to the exclusion of other entities'. In the present example, A has its own executive organs (there is a reference to a Minister of Foreign Aff airs), although it is not entirely successful in conducting foreign relations through them. It would also appear to have an independent legal system and its own courts.

Financial dependence:

You will remember that we told you at the outset to bear A's financial position in mind.

Here, again, it is a matter of degree. If it can be said that the dependence is so complete that B, in fact, dictates A's policies, then it is relevant. If A is still able to act independently of B (as would appear to be the case here since it is 'developing a form of government totally alien to that of A'), financial dependence alone will not preclude statehood.

Capacity to enter into relations with other states:

This particular characteristic seems to be problematic for A. Please bear these facts in mind and return to this activity after you have completed this learning unit.

The actual conclusion you reach is not crucial; you can argue either way. Depending on how you interpret the facts, A is financially dependent on B; it does not enjoy any independent recognition, save from other states dependent on B, and cannot conduct foreign affairs without this recognition; and its application for UN membership was refused. On the other hand, its financial dependence does not seem to influence its policy, it is recognised by some

states (even if this is a form of 'forced recognition', which should be seen as acceptance of the inevitable rather than approval), etcetera.

Activity 2.2

Write an essay in which you describe and evaluate the declaratory and constitutive theories of statehood, by referring to the development of each theory, as well as case law and existing academic opinion on the subject.

Unisa's Guidelines:

Define each theory, and distinguish between the two theories

Discuss the opinions of Crawford and Chen and explain whether the creation of a state is a mixed question of law and fact, or not

Explain the practical problems associated with the constitutive theory

Explain the problems, which the declaratory theory brings about. Pay careful attention to the question of 'who or what decides when these [the creteria for statehood] are met

You can also make reference to *S v Banda* which we discussed at the start of this learning unit

Discuss the theories of scholars, who have tried to find a 'middle way'

Discuss the emergence of the modern state in Europe and the subsequent wave of colonisation, when the constitutive theory became dominant. Pay attention to Wheaten's argument that 'while the "internal sovereignty of a state" did not "depend on its recognition by other states", a state's "external sovereignty" would "require recognition by other states in order to render it perfect and complete"

Reflect on the political convenience of the constitutive theory, which enabled the exercise of sovereignty by imperial European states

Describe the emergence of the declaratory theory at the end of World War I and the reasons therefor.

Activity 2.3

Explain whether the principle of self-determination and the process of decolonisation has had an impact on the declaratory and constitutive theories of statehood.

Unisa's Guidelines:

> In order to answer this question, you must study pages 49–53 of Strydom carefully and in detail.
>
> Focus on the fact that the decolonisation process proved challenging to the proponents of both the declaratory and constitutive theorists: In the case of the former – where the 'criteria' of statehood could not be fully met, and in the case of the latter – where political discretion could not be reconciled with the 'peremptory nature of self-determination'.

Self-assessment

1. Prior the official establishment of the various entities within Former Yugoslavia's territory, the Serbs in Bosnia controlled an area which they called 'Republica Srpska'.

   They proceeded to drive out Muslims and Croats and make 'Republica Srpska' a 'purely' Serbian entity within Bosnian territory. Republica Srpska was alleged to be in control of a defi ned territory, a permanent population, to have its own currency, and to even have concluded international agreements. If this case had come before you as a judge, would you have concluded that Republica Srpska was a state, or not? Substantiate your answer.

2. In November 2012, the United Nations General Assembly passed a resolution changing the status of Palestine from an "observer entity" to a "non-member observer state" within the United Nations system. Susan Rice (the U.S. Ambassador to the U.N.) told the Assembly: "This resolution does not establish that Palestine is a state." You have been tasked by the South African government to write a legal opinion on whether or not Palestine has become an independent state in light of the requirements for statehood in international law.

LEARNING UNIT 3: INTERNATIONAL LAW MAKING AS AN ATTRIBUTE OF STATE SOVEREIGNTY

Learning outcomes

1. Explain what is meant by the sources of international law
2. Provide an African perspective of the sources of international law
3. Discuss, in general terms, the provisions of article 38 of the Statute of the International Court of Justice
4. Evaluate the relevant importance of the different sources you have identified
5. Provide the definition of a treaty
6. Discuss the various provisions of the Vienna Convention on the Law of Treaties impacting on the definition of a treaty
7. Distinguish the various types of treaties
8. Explain the requirements for the conclusion of treaties
9. Apply the provisions of the Vienna Convention on the Law of Treaties governing the competence to conclude a treaty
10. Explain the difference between ratification and accession in the conclusion of treaties
11. Identify the factors making a treaty void or voidable and apply these to practical situations
12. Explain when a treaty can be terminated, again with reference to practical examples
13. Discuss the consequences of reservations to the operation of treaties
14. Define customary international law
15. List the elements of customary international law
16. Discuss usus as an element of customary international law

17. Discuss opinio iuris as an element of customary international law

18. Determine the existence of a rule of customary international law by applying the elements of customary international law

19. Explain general principles of law as a source of international law

20. Provide some examples of concepts that have been accepted as general principles

21. Discuss the role of judicial decisions as a source of international law

22. Discuss the role of writers as a source of international law

23. Explain the various qualifiers attached to the use of judicial decisions and writers by article 38(d) of the Statute

24. Discuss sources of international law emanating from international organisations

25. Discuss codification of international law

26. Define ius cogens

27. Distinguish ius cogens from customary international law

28. Distinguish between direct and indirect application of international law in the context of South African municipal law

29. Identify relevant provisions of the Constitution relating to the direct and indirect application of international law

30. Analyse ss 39 and 233 of the Constitution and relate them to the use of international law for the purpose of interpreting national law

31. Analyse ss 231 and 232 of the Constitution and relate them to treaties and custom respectively

Activity 3.1

In the Lotus case (France v Turkey) 1927 PCIL Rep Ser A no 10, a French tanker (the Lotus) collided with a Turkish tanker (the Boz-Kourt) on the high seas.

Eight Turkish soldiers were killed. When the Lotus docked at Constantinople, the French officer who was the lookout at the time of the collision was charged with culpable homicide in the Turkish courts. Called upon to decide on the issue of jurisdiction, the Permanent Court of International Justice (PCIJ) held that:

> *The rules of international law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.*

Using Article 38, can you recognise the two sources of international law identified in this quotation? Under which sections of article 38 of the Statute of the ICJ would you classify each source?

Unisa's Feedback

> Clearly, the court was referring to treaties (conventions), found in article 38(1)(a), and customary international law (usages generally accepted as expressing principles of law), which are provided for in article 38(1)(b).

Activity 3.2

Consider the following facts:

The Premier of Gauteng and the Governor of Washington State, United States of America, sign an agreement. The heading of the agreement reads 'Treaty of Friendship & Cooperation'. The agreement provides, among other things, that the administrations of the Province of Gauteng, South Africa, and the State of Washington, United States of America, will cooperate in promoting cultural contact and will, on public holidays, fl y each other's flags from their respective provincial/state legislatures.

Now consider the following facts:

A conference is arranged between South Africa, the United States of America and Mozambique to discuss possible compensatory payment to Mozambique for losses suffered through the following: the involvement of the former government of South Africa in the Mozambican civil war and in the shooting down of President Machel's

plane, which resulted in his death. At the close of the conference, South Africa and Mozambique sign a treaty brokered by the United States providing for the payment of compensation to the Mozambican nation.

South Africa is represented at the conference by her Minister of Foreign Affairs, Mozambique by her President and the United States by her Secretary of State for Defence.

In no more than one page, analyse and compare these two scenarios on the basis of the means of expressing consent and the authority to provide consent discussed thus far.

Unisa's Feedback

General

According to Article 7(1) and (2) of the Vienna Convention, the following persons may validly conclude binding treaties on behalf of their states:

Article 7(1) VC: Those persons who:

(a) Produce appropriate full powers; or

(b) It appears from the practice of the states concerned or from other circumstances that their intention was to consider those persons to be representing the state for such purposes or to dispense with full powers, are considered to be representing the state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the states to be bound by a treaty.

Article 7(2) VC: Persons by virtue of their functions and without having to produce full powers, namely:

(a) Heads of state, heads of government and ministers of foreign aff airs for all acts relating to the conclusion of the treaty.

(b) Heads of diplomatic missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited.

(c) Representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation, or organ.

Scenario 1:

Neither the premiers of our provinces, nor the US state governors are mentioned as people who can bind the state ex officio (as a result of the positions they hold – art 7(2)(a), (b), (c) of the VCLT). Unless they produce full powers (documents issued by the state stating that the person named in them has the authority to bind the state) or there is a practice that they have bound the state under similar circumstances (art 7(1) of the VCLT), they do not have the power to conclude a treaty which binds the state.

This is perhaps a good time to point out the following: If the problem does not expressly include mention of a certain situation, such a situation does not exist. In other words, you cannot read the existence of full powers or a usage into the facts. If we wanted to include them, we would have mentioned them.

The fact that the agreement is called a treaty does not mean that it is indeed one. Each agreement must be tested on its own merits.

The intention of the parties was clearly to promote friendship and cooperation, not to create binding rights which can be enforced. The subject matter regulated by the agreement is simply not of the nature which involves enforceable obligations on the part of the parties.

Our conclusion is therefore that the agreement is not a treaty. It is an agreement between two unauthorised officials which would be neither governed by nor enforceable under international law.

Scenario 2:

If you compare this set of facts to the facts of the previous activity, and compare it to the requirements for a valid treaty, the diff erences are glaring. Here two states are concluding an agreement at a conference with a specific purpose and goal. The agreement contains reciprocal rights and duties. The states are represented by persons who satisfy the requirements of article 7(2) of the VCLT. The agreement would be governed by international law. The UN would register the treaty. Therefore, it must be a treaty.

Activity 6

1. Using Strydom and the information above, write an essay in which you highlight where custom (as a source of international law) can be found and how it is formed.

   In the essay, focus on what the requirements for custom are, who is bound by custom, and what effect the rule of the persistent objector has on the formation of an international custom.

Unisa's Guidelines:

Start by quoting article 38(1)(b) of the ICJ Statute.

Thereafter discuss both requirements for custom: usus and opinio juris. Do not forget to include discussions of relevant case law, as shown above.

Describe the rule of the persistent objector with reference to the Anglo-Norwegian Fisheries, Case North Sea Continental Shelf Case, the Asylum case, and the Nicaragua case.

2. Using Smith, and the information provided above, highlight the extent to which African customary law informed the way pre-colonial African kingdoms practiced international law and foreign relations.

Unisa's Guidelines:

> Start by briefly explaining the relationship between African customary law and international law.
>
> Then provide examples on how certain principles of African customary law underlined issues such as salience of contracts, exchange/recognition of ambassadors, and diplomatic immunity granted to emissaries or ambassadors.

Activity 3.3

South Africa is not formally a party to the Vienna Convention on the Law of Treaties but has declared that it regards the treaty's provisions as binding. Treaty interpretation is governed by articles 31 and 32 of the Vienna Convention. You are the advocate for the defence in a case before a South African municipal court where the interpretation of a treaty is at issue. You argue that the court must interpret the treaty in terms of the Vienna Convention. The advocate for the state, on the other hand, argues that because South Africa has not formally signed the Vienna Convention, its provisions are not relevant in a South African court. Explain, with reference to the Constitution of South Africa, 1996 why you feel the court is entitled to make use of the interpretation.

Unisa's Feedback

> The question you must answer is whether or not the municipal court must apply the VCLT provisions in interpreting the treaty. If you want to apply these provisions you must have a basis in South African law on which to work. The two most obvious bases are treaty and custom. The most obvious basis is treaty–and this is what most students would (incorrectly) go for in an examination, because they have seen the magic word 'treaty'. However, this simply proves that they have not read the question, because the very fi rst statement in the question says that South Africa is not a party to the VCLT. Therefore the VCLT cannot be applied as a treaty incorporated into our law because fi rstly we are not a party to it and secondly there is no indication in the facts that it has been incorporated as required by section 231(4) of the Constitution.

The VCLT cannot be used on the basis that it forms part of our law. The obvious basis that remains is custom. You must therefore test the VCLT against the requirements for customary international law. Here you must look at the nature of the VCLT. The latter is a codifi cation (a bringing together in written form) of the customary international law governing treaties existing at the time of its compilation. You will also remember that the Nicaragua case has shown that if custom is incorporated in a treaty, this does not mean that the customary rules fall away. Customary rules continue to exist alongside the treaty and are binding on states who are not party to the treaty.

What are the requirements for custom? First, usus is required. The very fact that the VCLT was drawn up proves that this requirement has been met as the VCLT is a compilation of the rules governing treaties which states at that time considered to be general rules of international law. Remember to quote the cases dealing with usage. Opinio iuris too has been met because the treaty is generally accepted. In the case of South Africa, we make things clear by stating South Africa has declared that it regards the provisions as binding.

A clearer expression of opinio iuris would not be easy to fi nd. Remember to quote the cases relevant to opinio iuris.

The VCLT meets the requirements set in South African legislation (and international law) for the existence of a customary rule of international law. What is the position of customary international law in our law? In terms of the 1996 Constitution, customary international law is law in the Republic unless it confl icts with the Constitution or an Act of parliament.

The VCLT does neither. Articles 31 and 32 of the VCLT are therefore law in the Republic and the court must interpret the treaty in terms of these provisions.

Self-assessment

1. You have encountered the concept of jus cogens in a number of places while you were studying this study unit. Identify where this concept has been discussed and then analyse the role it plays in each of these instances.

2. The ICJ's Advisory Opinion on Reservations to the Convention on the Prevention of the Crime of Genocide 1951 ICJ Rep was seminal as regards the status of reservations to treaties. Analyse the eff ect which this opinion has had on advancing or retarding multilateral international relations.

3. For 45 years, South Africa has drawn electricity from a source located in Zimbabwe – this electricity is essential for the economic development of South Africa. That said, no formal agreement has ever been concluded between the parties. After a democratic election in Zimbabwe, a new government comes to power.

   This government immediately closes off South Africa's access to this power source. The South Africa government registers a formal protest with the new Zimbabwean government. After consideration of the protest, Zimbabwe issues a statement in which it acknowledges that it feels obliged to meet its obligations to supply South Africa with power and the power supply is restored. However, this is short lived and one month later Zimbabwe again cuts off the power supply, declaring that it is under no obligation to facilitate South African domination of the region by supplying cheap power. South Africa claims that Zimbabwe has breached a norm of international law.

   Using these facts, identify the norm on which South Africa will have to rely. Discuss all aspects of the requirements for the formation of this norm through an analysis of the facts given.

LEARNING UNIT 4: THE FUNDAMENTAL PRINCIPLES OF THE INTERNATIONAL LEGAL ORDER

Learning outcomes

1. Describe and define the principles of sovereign equality and good faith

2. Understand the issues raised by critical scholars regarding the unequal structure of the international system

3. Indicate in which international instruments the abovementioned principles can be found

4. Apply these principles to practical scenarios

5. Explain what is meant by ‘peaceful settlement of disputes’ and explain the content and application of the UN Charter provisions related thereto

6. Analyse the impact, which the prohibition of the use of force has had on modern day international law

7. Apply the rules and principles related to the prohibiton of the use of force to practical situations

8. Define the term “state liability” and distinguish between the different types thereof

9. Understand when an act may be attributable to a state

10. Discuss the provisions of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC Draft Articles on Diplomatic Protection and the ILC Draft Articles on Responsibility of International Organisations and apply those provisions to practical situations.

Activity 4.1

List the elements which constitute sovereign equality in terms of the General Assembly’s Friendly Relations Resolution.

Unisa’s Guidelines

> Strydom lists these elements on p 110 of the textbook. Please ensure that you know them.
>
> Discuss some of the issues raised by the TWAIL movement regarding the biased and unequal structure of the international system.
>
> See Mutua and Anghie (pp 31–38).

Activity 4.2

South Africa, USA and Angola meet in Durban to conclude a treaty. The treaty provides that, if it at the end of six months, the government of Russia has not changed its internal politics fundamentally, South Africa, USA and Angola will jointly attack and

overthrow the government of Russia, and install a new democratically-elected government.

Analyse the validity of this agreement.

Unisa's Feedback

The treaty cannot be valid because it violates what is probably the only generally accepted rule of jus cogens, the prohibition on use of force, enshrined in art 2(4) of the UN Charter.

You will also recall that in terms of article 53 of the VCLT: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation [deviation] is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

An interesting question which arises in this context is whether the term 'use of force' is wider than the term 'war'. Take note of the ICJ's observation in the Nuclear Weapons case:

> *If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notion of 'threat' and 'use' of force under article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal…the threat to use such force will likewise be illegal.*

Secondly, please bear in mind that the threat or use of force must be against the territorial integrity and political independence of another state, which Strydom et al define as 'the totality of the rights a state possesses with regard to its territory and people'.

Activity 4.3

On 2 May 2011, the United States of America (USA) entered Pakistani territory, without authorisation, and killed Osama bin Laden in his home. From reports, Bin Laden was unarmed when he was shot and killed by members of the American special forces.

Evaluate the actions of the United States.

Unisa's Feedback

> Since Pakistan did not give its consent for the operation, the actions of the US were in breach of the provisions of article 2(4) of the UN Charter, and a violation of Pakistan's sovereignty and territorial integrity. As to whether the actions of the US could have been justified as a retort or self-defence is something you can consider after delving into the following learning unit which is dedicated to the enforcement of international law.
>
> Lastly, we should point out that in the context of artcle 2(4), the use of force referred to, is armed force (rather than – say – economic force). Broader formulations of the 'prohibition of interference' principle is found in the United Nations Friendly Relations Resolution (where reference is made to the use of economic, political, or any type of measures for purposes of coercion). Another interesting example is found in the 1948 OAS Charter which prohibits 'not only armed force, but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.'

Activity 4.4

X is a member of an extremist right-wing group wanted in South Africa to face charges of terrorism. Feeling that his arrest is imminent, he flees to Swaziland where he settles.

The Swazi authorities are aware of his presence in the country and allow him to remain on a temporary residence permit. There is a valid extradition treaty between South Africa and Swaziland.

The South African police officer in charge of the case approaches his Swazi counterpart and asks if he can enter the country to capture X. The Swazi offi cial refuses, saying that the correct procedure under the extradition treaty should be followed. The South African officer conveys this news to his men and tells them that they may not seize X in Swaziland.

Despite these instructions, A and B, two constables, enter Swaziland one night in their police vehicle and in uniform, grab X and bring him back to South Africa where he is arrested and charged.

Analyse the facts given and discuss fully whether South Africa has incurred liability towards Swaziland and, if so, what form this liability takes and on what basis it rests.

Would your answer differ if A and B were brothers whose father had been murdered by X? They entered Swaziland on tourist visas, ostensibly to play in a golf tournament at the Royal Swazi Sun and, when they grabbed X, they were in civilian clothes.

Unisa's Feedback

> Since a state cannot itself act, the actual physical act must be performed by an individual acting on behalf of the state. South Africa can violate international law, but the actual deed must be performed by an individual (or organ). This is where imputability enters the picture.
>
> The cardinal element of imputability is the capacity in which the person or organ acts.
>
> The state is responsible only for the acts of its offi cials or organs. There must be a link – a nexus – between the person/organ acting and the state. Simply put, if X walks down the street and throws a cricket ball through my neighbour's window, it is none of my business – and not my responsibility. If, however, my son does the same thing, it is very much my responsibility. The basis for this responsibility is the relationship between the individual causing the damage and me.
>
> The state is responsible in exactly the same manner for violations of international law by its officials/organs or individuals for whom it accepts

responsibility. An official is, of course, also an individual and each case must therefore be judged on its own merits. In terms of the given facts, police officers are public officials. Because of their actions, South Africa has violated international law (by the abduction and violation of Swaziland's sovereign territory) and will therefore incur direct liability towards Swaziland.

In 1987 in Nduli it was argued that the police officers in similar circumstances had acted beyond the scope of their duties and that the state therefore could not be held liable for their actions. This argument was upheld by the court. In international law terms, the reasoning is not sound. Although the police officers had exceeded the scope of their duties, they had acted as officials of the state and the state had to be liable. In Ebrahim in 1991, on similar facts, the court held that the state had to approach the court with clean hands and refused to exercise jurisdiction in the matter.

If the two policemen acted as private individuals, ostensibly as tourists to play in a golf tournament, wearing civilian clothes, the state would not be liable because there is not a sufficient nexus between them as private individuals and the state.

The law of State Responsibility is contained in the 2001 International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('Draft Articles on State Responsibility'). Study Strydom et al pp 120–121 and pay careful attention to the concept of wrongfulness (arising where a legal duty has been breached), and the concept of attributability (on which we briefly touched on above).

There are various circumstances in which the question of attributability may arise:

(i) Responsibility for the conduct of state organs pp 121–124

> In terms of article 4(1) of the Draft Articles on State Responsibility, "[t]he conduct of any State organ shall be considered as an act of state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the

organization of the State and whatever its character as an organ of the central government or a territorial unit of the State."

This should not come as a surprise, considering that the conduct of an organ of state is regarded as an act of this state in terms of the rules of customary international law.

And as it was confirmed in the Youmans Claim (US v Mexico, 1926), the decisive factors to consider here are whether the person acted in official capacity and while on duty (see also Article 7 of the Draft Articles on State Responsibility), although distinguishing between acts done in private capacity and acts committed in official capacity can be tricky, as was illustrated by the Mallen case (United Mexican States v USA, 1927).

Liability as a result of a failure to act can also arise (see Strydom's discussion of Albania's omission in the Corfu Channel case) and Iran's liability in the Tehran Hostages case.

(ii) Responsibility for the conduct of non-state entities exercising elements of governmental authority (see Strydom p 124)

This is issue is governed by article 5 of the Draft Articles on State Responsibility, and concerns the question on whether the actions of entities such as parastatal entities can result in state liability. The answer is 'yes', provided that there was some exercise of governmental authority.

(iii) Responsibility for the conduct of a private person or a group of persons (Strydom pp 124–129)

In terms of article 8, for liability to arise, the private person(s) must have been acting on the instructions, or have been under the control of, the state in question.

Pay careful attention to the Bosnia Genocide case (where it was held that it is not enough for the instructions to be of a general nature); the Nicaragua case (where 'effective control of the military and paramilitary

operations' was required) and the Tadic case (where the ICTY used the 'overall control test').

(iv) Responsibility for the conduct and insurgents and insurrectional groups (Strydom pp 129)

Generally, a state cannot be held liable for the acts of the insurrectional movement, because the latter has its own structures and organization.

However, should that movement become the government of the state, then its actions will be considered to be the actions of that state un under international law (article 10 of the Draft Articles on State Responsibility).

(v) Attribution based on subsequent acceptance or approval of a wrongful act (Strydom p 130)

This situation is governed by article 11 of the Draft Articles on State Responsibility and is illustrated by the Tehran Hostages case discussed above.

Activity 4.5

In the Nicaragua case (Nicaragua v United States of America), among other issues, the International Court of Justice (ICJ) was tasked with deciding whether the extent of support that the United States lent to the Contras (a militia group which at the time actively engaged in hostilities with the government of Nicaragua) was of such a nature that alleged violations by the Contras could be imputed/attributed to the United States.

On this issue the ICJ held:

> *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed [para. 115].*

Write an essay in which you discuss the following two issues: 1) what the potential implications would be should the conduct of the Contras be imputed/attributed to the United States; and 2) how the test of such immutability/attribution, expressed as the

“effective control” test in the Nicaragua case, has developed in international law, and what the preferred test or standard is at present.

Unisa Feedback

If the conduct of the Contras can be imputed to the USA, the latter will incur liability under international law.

In your answer, you should discuss the following:

1. For a state to be liable there must be a sufficient link between the person/ entity acting and the state. The actors here would include state organs and whether they act in their official capacity. Conversely, the acts of an individual acting acting in a private capacity will be diffi cult to be attributed to the state. However, as we saw in the Iran Hostages case, where the acts of an individual are accompanied by an act or omission by the state, the state may indeed incur liability (do you remember what the most common forms of omission are?)

2. Discuss the Genocide Case (Bosnia v Serbia) (2007), where the Court stated : ‘One of the cornerstones of the law of state responsibility…is that the conduct of any state organ is to be considered an act of the state under international law and therefore gives rise to the responsibility of the state if it constitutes a breach of an international obligation of the state’.

3. Discuss article 4(1) of the Draft Articles on State Responsibility.

4. Explain that the conduct of a person or entity not an organ of the state, but authorized to exercise elements of governmental authority, can be accepted as an act of the state.

5. Furthermore, a state is responsible for acts performed by offi cials within the scope of their employment.

6. Liability ensues even in the case of acts committed ultra vires. In this regard, article 7 of the Draft Articles on State Responsibility provides: “The conduct of an organ of a State or of a person or entity empowered to exercise

elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions" (as was illustrated by the Youmans Claim).

7. As far as SA case law is concerned, you may recall that in Nduli v Minister of Justice the court held that the South African state could not be held responsible for an arrest carried out by the South African police in Swaziland (since the arrest took place contrary to superior instructions), however in S v Ebrahim it was held that the state would incur responsibility for an abduction by 'instruments' of the state (aven though the abduction had not been specifically authorised).

8. Article 8 provides: "The conduct of a person or group of persons shall be considered an act of a State under the international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

9. In this regard, you should discuss the degree of control which ought to be exercised before liability can ensue. Case in point is the given Nicaragua case. The ICJ held that while the United States was responsible for the 'planning, direction and support' given to the contras, not all of their was attributable to the USA (as is evident in the quoted passage).

10. This approach was seen as too strict and therefore criticized by the ICTY in Tadic: where the Tribunal was of the view that what was suffi cient was an 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.'

11. The Tadic approach, however, was rejected in the Genocide Case (Bosnia v Serbia) where according to the ICJ, such a test had 'the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of state responsibility: a state is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.

The next question, which we must consider is what the consequences of are an internationally wrongful act? In this regard, you must study Strydom pp 131–134.

The recalcitrant state must cease its wrongful activity (the act or omission responsible for the breach) and in terms of article 31 of the Draft Articles on State Responsibility, it must make full reparations. Those can take the form of restitution, compensation or satisfaction.

One category of legal consequences deserve special mention: those that arise as a result of the breach of a peremptory norm of international law (and here you must familiarize yourself with the concepts of erga omnes (obligation owed to the international community as a whole) and jus cogens (a norm from which no derogation is permitted). The latter would seem to include the prohibition of genocide, slavery, aggression, apartheid and torture. What we want to emphasise here is that in instances where those acts occur, third-party states are obliged to bring an end to the breach by lawful means, and to refrain from recognizing a situation which was brought about as a result of the breach. In this regard, see the examples provided by Strydom concerning the South West Africa/Namibia case and the Israel Wall case.

Finally, you have to understand that in order for a state to seek redress, it must have the necessary locus standi. The state must demonstrate that it has a sufficient legal interest in the dispute: a state must be a beneficiary of an international obligation in order to have the right to enforce it. Study pp 137–140 of your textbook and pay careful attention to the question of how 'legal interest' has been defined by the ICJ.

Activity 4.6

South Africa and Zimbabwe have concluded a bi-lateral treaty in terms of which the two states allow one another's aircraft to fl y over and into one another's territory. Alarmed by the ever deteriorating human rights situation in Zimbabwe, which South Africa now regards as approaching the proportions of genocide, but certainly as gross violations of the human rights of Zimbabwean citizens, South Africa bans all Zimbabwe's rights to fly within SA airspace. Zimbabwe claims that South Africa,

through violating an international obligation imposed by treaty, has incurred liability towards Zimbabwe for the losses it has suffered. South Africa claims that although it has breached a treaty obligation, this is justified by Zimbabwe's far more serious violation of an international norm, owed to all nations.

Discuss the validity of the claims made by both South Africa and Zimbabwe.

Unisa's Feedback

The ILC Commentary on article 40 of the Draft Articles on State Responsibility provides that, inter alia, the prohibition of genocide and torture are examples of peremptory norms of general international law. Articles 40 and 41 of the Draft Articles on State Responsibility stipulate that states must cooperate by lawful means in order to bring an end to the breach of such obligations. In addition, states "shall not recognise as lawful a situation created by such a serious breach". A serious breach of an obligation occurs in situations in which the responsible state has systematically failed to fulfil its obligation. Article 49 (dealing with countermeasures which may be taken by an injured state) states that its provisions do not prejudice the right of a state (not necessarily an "injured" one) to take lawful measures against another state that has breached an obligation owed to the international community as a whole. The purpose of such measures is to achieve a "cessation of the breach and reparation in the interest of the injured state or the beneficiaries of the obligation breached".

If Zimbabwe's practice of systematically violating human rights is indeed found to qualify as a serious breach of a peremptory norm of general international law, then South Africa will be justified in breaching the treaty obligations, on the basis of the provisions of articles 40, 41 and 49. History is full of examples, when states, which have not been directly injured by another state's unlawful practice, have taken measures in order to stop the violation. A prime example is the conduct of the international community, or rather members thereof, against apartheid South Africa. For example, in 1986 the US violated the US-South Africa Aviation Agreement and suspended the landing rights of SAA on US territory in its efforts to compel South Africa to abolish the system of apartheid.

Activity 4.7

Through an analysis of South African case law, discuss fully what is meant by diplomatic protection, when the need for this protection may arise, what forms the protection can take; whether the state can be compelled to render such assistance, and if so–the extent of this obligation. Lastly, assess whether the South African approach is in line with contemporary international law.

Unisa's Feedback

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings. The cornerstone of this right is that an injury to a national is considered to be an injury to the state (Panevyezys-Saldutiskis Railway Case). Therefore, under international law, the right of diplomatic protection vests in the state. The state is not under any duty to exercise its right. While the domestic laws of a state may impose such obligation, international law does not.

The interesting question is whether South African law imposes such an obligation on the South African government. In this context we shall consider the cases of Kaunda, Van Zyl and Von Abo.

The facts in Kaunda v President of the Republic of South Africa 2005 (4) SA (CC) may be summarised briefly as follows: a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death. They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection.

The court dismissed the application. The majority decision, written by Chaskalson CJ (as he was then known), recognised that international law did

not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad. The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear. Should a request for diplomatic protection ever be refused ”the decision would be justiciable, and a court could order the government to take appropriate action”.

The court also noted that the assertion of diplomatic protection was “essentially a function of the executive” with which the “courts are ill equipped to deal”. However, if the executive were to refuse to consider a legitimate request, or if it were to deal with it in bad faith or irrationally, the court could intervene. In other words, while the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith.

In a concurring opinion, Ngcobo J, examined, inter alia, section 3 (the right to a common South African citizenship) and section 7 which provides that:

(1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affi rms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Ngcobo J concluded that “diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Government’s own declared policy and acknowledged constitutional duty”.

The dissenting opinion of O'Regan J acknowledged that the conduct of foreign affairs is typically an executive power under the Constitution and submitted that, in the conduct of foreign relations, "the executive must be aff orded considerable latitude". She suggested that the court should declare that the executive was "under a constitutional obligation to take appropriate steps to provide diplomatic protection", but that the executive itself was best placed to determine what steps it should take.

In Van Zyl v Government of the RSA 2008 (3) SA 294 (SCA) the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho. The dispute related to expropriation of the applicants' mining leases, mining rights and tributing agreements without compensation being paid to them. The contracts referred to were not internationalised. The expropriation had taken place in execution of the Lesotho Highlands Water Project. The latter was provided for in a treaty between the SA government and that of Lesotho.

It was claimed that the applicants were entitled to diplomatic protection, because the government of Lesotho had committed an international delict. The SA government had refused the application on the grounds that no right to diplomatic protection accruing to an individual existed in international law (since, in deciding to exercise diplomatic protection, the SA state would have been asserting its own right). The applicants also contended that inaction by the SA government would lead to a violation of a number of provisions of the SA Constitution.

Ultimately, the application was dismissed. Amongst others, the applicants could not prove that Lesotho had committed an international delict, nor did they satisfy the two prerequisites for the admissibility of a claim for purposes of diplomatic protection (nationality and exhaustion of local remedies.) The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection. The court distinguished the case from Kaunda in that the latter concerned gross human right violations, while in the Van Zyl case the applicants had been expropriated and international law did not recognise the protection of property as an international human right.

In Von Abo v Government of the RSA 2009 (2) SA 526 (T) the applicant was a South African farmer in Zimbabwe. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation. Von Abo was not compensated and he had exhausted all local remedies. Von Abo requested the South African government to afford him diplomatic protection vis-à-vis Zimbabwe. The applicant claimed that he had a right to such protection in terms of the South African Constitution. Relying on the judgment in Kaunda, the court in Von Abo found that there need not be an actual refusal on the part of government to grant diplomatic protection before a court would intervene. The court stated that, in an appropriate case, a court could also come to the assistance of the aggrieved national where government 'fails to respond appropriately' or 'deals with the matter in bad faith or irrationally'. The court relied on, inter alia, the judgment in Kaunda to conclude that the state had a duty to provide assistance to the applicant.

This was a Transvaal Provincial Division judgment (later, North Gauteng Provincial Division).

Later, the Constitutional Court ruled that it was not necessary for it to confirm the Transvaal Provincial Division order (in Von Abo v Government of the RSA and Others 2009 (10) BCLR 1052 (CC), so Von Abo's application went back to the High Court to establish whether or not the government had complied with the court's order. In Von Abo v Government of the RSA 2010 (3) SA 269 (GNP) the court found that the government had not done much until then to assist Von Abo and had thus not complied with the court's order. The court awarded Von Abo damages arising from the infringement of his rights in Zimbabwe. In 2011, the government appealed to the Supreme Court of Appeal (SCA) and the SCA disagreed with the High Court's award of damages. (We trust that you remember the SA court hierarchy and the rule that higher courts may overturn the decisions of the lower courts).

In The Government of the Republic of South Africa v Von Abo (2011) ZASCA 65 it was held: It is ... a completely foreign concept that one state should attract liability in terms of municipal law ... vis-à-vis its own national for the wrongs of

another state, committed by that state in another country vis-à-vis the same individual. The only breach that could have occurred in the present case is that the [government] failed to comply with their duty vis-à-vis the respondent to act appropriately to his request for diplomatic protection .... The constitutional breach in this case, if there was one, could only have been a failure to have responded appropriately to the respondent's request for diplomatic protection.

For the present, the individual's right to diplomatic protection remains a moot point.

Activity 4.8

On 10 March 1998, Robert McBride, a South African diplomat was arrested in Maputo in connection with allegations of gun running. He was held in a Maputo jail in an undersized cell under appalling conditions along with 50 Mocambican detainees for some two months without charges being brought and without his being allowed to contact his legal representative or the South African diplomatic or consular representatives.

Would you say that South Africa has a claim against Mocambique for the treatment of its national? Could McBride's wife compel the South African government to act on her husband's behalf?

Unisa's Feedback

Has an international norm been violated? – Yes

What is the basis of SA's interest? – Consider the nationality of the diplomat.

Can the state be compelled to act? – Discuss the position under both international law and domestic law as we have done above.

Self-assessment

Discuss the approach advocated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts to the following aspects:

When wrongfulness will be excluded;

Necessity as a ground for excluding state liability for a wrongful act;

Serious breaches of peremptory norms (our old 'friends' jus cogens and obligations *erga omnes*

LEARNING UNIT 5: MAINTAINING INTERNATIONAL PEACE AND SECURITY: THE ENFORCEMENT OF INTERNATIONAL LAW

Learning outcomes

1. Describe the different methods of international law enforcement.
2. Identify the appropriate enforcement measure and apply it to any given practical situation.
3. Explain under what curcumstances use of force may be justified in international law
4. Apply the relevant legal law principles in order to identify breaches of international law in situations where forcible measures have been used.
5. Analyse and explain the controversies created by the use of force in international law

Activity 5.1

"The powers of the Security Council under Chapter VII are far-reaching." Discuss the veracity of the statement with reference to the United Nations Charter and recent developments in international law.

Unisa's comment

> The information below is not a model answer, nor a comprehensive or an exhaustive one:
>
> It is simply an example of some of the issues, which you could have mentioned:
>
> The SC has the primary responsibility for the maintenance of international peace and security, as conferred upon it by the UN member states (article 24(1)). In terms of article 25, '[t]he members of the United Nations agree to

accept and carry out the decisions of the Security Council in accordance of the present Charter,' while article 103 proclaims that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' It is thus obvious that the powers of the SC carry some significance, especially those exercised under Chapter VII since the latter may involve legally binding decisions. It should be noted that Article 25, which contains the obligation on member states to carry out SC decisions does not apply to Chapter VI. Chapter VI concerns recommendations, which have the same weight as GA recommendations. This question concerns powers exercised under Chapter VII only.

Chapter VII covers '[a]ction with respect to the threats to the peace, breaches of the peace, and acts of aggression' and encompasses articles 39–51. Let us have a look at some of those provisions:

In terms of Article 39 the SC is empowered to determine the 'existence of any threat to the peace, breach of the peace, or act of aggression' and make recommendations, or decisions as to the measures which should be taken (as per art 41 and 42) in order to maintain or restore international peace and security. You could have also discussed the question of whether the SC may adopt a resolution in terms of article 39 when there has been a serious violation of human rights within a state's territory, especially in light of the inconsistent practice of the Security Council in this regard. Mention could have been made of a number of situations, such as the Security Council's response to apartheid South Africa; the military junta in Myanmar; and the violence against civilians in Libya in 2011.

Article 40 concerns the adoption of provisional measures prior to the taking of an enforcement action (e.g.) a cease-fire.

In terms of Article 41 the SC may call upon members to apply measures not involving the use of force in order to give eff ect to its decisions. These measures (also decided upon by the SC) may include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio,

and other means of communication, and the severance of diplomatic relations'. In practice, such sanctions have included those imposed on Rhodesia (1966-1979); the arms embargo imposed on South Africa; the 1990 economic sanctions against Iraq; the 2005 economic sanctions imposed on Sudan et cetera.

Article 42 proclaims that if the measures provided for in article 41 are inadequate (because the SC considers them to be so, or because they have proved to be inadequate), then the SC 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. In other words, article 42 concerns forcible measures. As Dugard (2011) explains, when the Charter was drafted, it was envisaged that such action would be undertaken by military contingents (made available to the SC by virtue of agreements with state parties) which would also be under the command of a Military Staff Committee (in terms of article 47). However, no force was ever established under article 43. Therefore, any enforcement action, which has thus far been undertaken under this article, has amounted to action authorised by the SC. While such authorisation is an 'implied power' under the Charter, it can be problematic in that the SC does not have absolute control over the actual military actions and procedures.

Here, you could have also discussed various instances in which the SC has authorised the use of force under article 42, such the sending of armed forces to Korea in 1950's; the authorisation of the use of force against Iraq in 1991; the imposition of a no-fly zone over Ghadaffi forces in 2011.

• Articles 48–49 proclaim that the actions, which must be taken in order to carry out SC decisions, will be taken by all member states, or only by some of them – depending on what the SC has determined. Furthermore, member states must provide mutual assistance to one another when executing the measures decided by the SC.

• Interestingly, article 50 provides that should any state encounter special economic problems as a result of the SC measures described above, it will have the right to consult the SC 'with regard to a solution of those problems'.

• Article 51 is the 'self-defence' provision which will be dealt with at a later stage.

While it may appear that the abovementioned powers are extensive, it should be remembered that any decision must have survived the exercise of the veto powers vested in the five permanent members of the SC. However, they may very well have their own interests to protect and thus render the SC ineff ective (which was particularly true of situations, which occurred before the end of the Cold War). It should be noted that after the Cold War, the SC was able to reach consensus on taking action under Chapter VII in many more instances. (as explained by Dugard).

Lastly, you could have discussed the nature of recent SC resolutions, and their resemblance to normative legislative measures. It should be pointed out from the outset that in adopting binding decisions under Chapter VII, the SC does not 'legislate', but as Dugard points out the purpose of the SC in that context is 'to identify the conduct required of a Member State because of its pre-existing Charter obligations'. Yet, recent resolutions have the appearance of legislation: 'they are general and abstract in character; they are phrased in neutral language, apply to an indefinite number of cases and are not limited in time; they do not name states; and although triggered by a particular situation they are not restricted to it.'

You could have also discussed the possibility (and likelihood) of a judicial review of SC actions by the ICJ.

Activity 5.2

As we have already seen, an act of aggression may trigger a decision by the Security Council to use force, and therefore its significance in the application of international law cannot be denied. Write a brief essay in which you explain how the term has been defined in international instruments and judgments.

Unisa's guidelines

Discuss the following:

• Relevant provisions of GA Res 3314 (XXIX) of 1974;

• Relevant provisions of GA Res 2625 (XXV) of 1970 (Friendly Relations Resolution);

• The relevant observations of the court in the Nicaragua case (as discussed in Strydom);

• Article 5(1)(d) of the 1998 Rome Statute of the International Criminal Court, together with Resolution RC/Res.6 (adopted on 11 June 2010), which defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

Activity 5.3

Article 4(h) of the Constitutive Act of the African Union (2000) provides as follows:

The Union shall function in accordance with the following principles: […]

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

Write an essay in which you consider whether such intervention in terms of Article 4(h) requires Security Council authorization. You can assume that the intervention in question qualifies as a use of force.

Unisa's Guidelines:

The following points should be included in the answer:

• The general prohibition on the use of force, and the exceptions to this rule (article 51 of the UN Charter, and action authorized by the SC under Chap VII of the UN Charter) should be discussed;

• The legality of humanitarian intervention may also be discussed briefly;

• Article 53 of the UN Charter ('no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council') should be discussed, together with examples of instances where this article had not been complied with.

• Conclusion: SC authorisation must be obtained.

Activity 5.4

On 11 September 2001, Islamic extremists flew two passenger aircraft into the World Trade Centre in New York, United States of America, destroying the heart of Manhattan and killing thousands of innocent civilian Americans. The United States retaliated by declaring "war" on terrorism and bombing Afghanistan where the leadership of the Islamic Group were living.

Assess the appropriateness of the American response in terms of the requirements for self defence.

Unisa's Feedback

It is not clear whether the right to self-defence can be exercised only if an armed attack occurs (whether article 51 amounts to an exclusive and complete formulation of the right), or whether article 51 allows anticipatory self-defence (whether 'inherent right' indicates that article 51 has preserved the pre-Charter customary law definition of the right to self-defence, which would include the right to launch a pre-emptive strike). Under customary international law the right to use force in self-defence was justified if the need for it was instant, overwhelming and immediate, and there was no viable alternative action.

The attacks on Afghanistan were launched on the grounds that the Taliban government had allowed al-Qaeda terrorists to train and operate from its territory and had not taken any action against al-Qaeda after having been asked to do so by the USA. The USA therefore had reason to believe that further acts of terrorism may be directed against it.

It is true that article 51 envisages acts of self-defence against a state and not against a non-state actor such as al-Qaeda. However, it may be argued that

when article 51 was drafted, terrorism was not as widespread as it is today. Secondly, the fact that the Taliban government was harbouring terrorists and had refused to take action against them leads to the conclusion that the acts of al-Qaeda were attributable to the government of Afghanistan.

Another objection to the US actions which may be harder to refute is that the so-called action in self-defence taken with a view of preventing further terrorist attacks stretched the limits of anticipatory self-defence too far, since anticipatory self-defence covers only responses to an imminent attack which cannot be prevented by any other means.

On the other hand, in defence of US actions, it must be noted that after the acts of terrorism had been committed, the Security Council adopted Resolutions 1368 and 1373 recognising the inherent right to self-defence of states and condemning the terrorist attacks. It was after these resolutions had been adopted that the USA invaded Afghanistan. Some scholars, relying on the content of the SC Resolutions mentioned above, have argued that a new subspecies of self-defence, namely self-defence against terrorism, had emerged and the attack on Afghanistan had been approved by the SC Resolutions in recognition that such a right may be exercised.

Self-assessment

State X is a developing state consisting of a majority population of the Y-race and the minority population of the X-race. Its government is to a large extent subservient to that of State Y. The X-men, a well-organised militant group operating within State X, have been planning a coup against the current government for years. The coup is successful, and in February 2016 the X-men proclaim themselves the governing authority of State X.

The new X-government institutes a strict segregation regime (apartheid) between the X and the Y-races, in terms of which the minority X-race subjugates the majority Y-race.

The X-men government also harbour very strong sentiments against State Y, and relations between the two states become hostile. In the meantime, the pro-

Y counter-insurgents within State X start organising themselves for a strike against the X-men government. State Y secretly promotes the pro-Y dissidents by supplying them with weapons and training.

Analyse this situation and write a legal opinion, explaining whether State Y has violated any rules of international law, and if so, what State X's remedies would be.

LEARNING UNIT 6: JURISDICTION OF STATES

Learning outcomes

1. Explain the concept of territorial jurisdiction;
2. Explain extra-territorial jurisdiction and the problems this causes in international relations;
3. Explain the various bases on which jurisdiction can be claimed;
4. Apply these principles to practical examples;
5. Recognize, identify and explain the different types of immunity from jurisdiction;
6. Apply the principles of state/sovereign immunity, as well as diplomatic and consular immunity to practical situations.

Activity 6.1

On 9 January 2015 Amnesty International reported on the massive escalation of violence perpetrated by the Nigerian-based non-state group Boko Haram. The attack on Baga and surrounding towns, looks as if it could be Boko Haram's deadliest act in a catalogue of increasingly heinous attacks carried out by the group. If reports that the town was largely razed to the ground and that hundreds or even as many as two thousand civilians were killed are true, this marks a disturbing and bloody escalation of Boko Haram's ongoing onslaught against the civilian population.

Abubakar Shekau, who is from Niger not Nigeria (they are different countries) is the leader of Boko Haram and the United States designated Boko Haram a terrorist organization during November 2013.

In addition to the above-mentioned facts, assume the following facts for purposes of this question: many of the victims of the recent violence perpetrated by Boko Haram are nationals of Cameroon. Furthermore, on the morning of 8 January 2015, Boko Haram members began firing mortars (explosive shells) across the border into Chad, killing many villagers on the Chadian side of the border. These attacks all occurred under the direction of, and in the presence of Abubakar Shekau.

On the basis of the above facts discuss whether and what the basis would be, the following states can exercise criminal jurisdiction over Abubakar Shekau:

(a) Nigeria;

(b) Niger;

(c) United States;

(d) Cameroon;

(e) Chad; and

(f) South Africa.

Include in your answer a discussion of jurisdiction in the more general sense.

Unisa's Guidelines:

> Define 'jurisdiction' and discuss the facts and judgment of the Lotus case.
>
> Define and describe each base of jurisdiction (as discussed above) Identify the bases applicable to each state:
>
> (a) Nigeria– territoriality/universality
>
> (b) Niger– nationality/objective territoriality (eff ects)/universality
>
> (c) USA– universality
>
> (d) Cameroon– passive personality/universality
>
> (e) Chad – objective territoriality (effects)/universality

(f) South Africa – universality

Activity 6.2

Temba is an artist from Pretoria who concludes an agreement with the Government of Goldava. The agreement stipulates that he will paint a portrait of the wife of the Goldavian Ambassador to South Africa (Mrs Nip), which is to be hung on the wall of the Ambassador's office and that in turn he will be paid R10 000.00 deposit before he starts working and R25 000.00 when his work is completed. He receives the deposit in good time. A month later the portrait is finished, and he shows it to Mrs Nip at the embassy.

Mrs Nip is not satisfied with the way in which she has been depicted by Temba. Temba quietly insists that the portrait is life-like and as requested. Mrs Nip loses her temper and throws a paper weight at Temba. Temba is seriously injured and taken to hospital.

When his condition improves he approaches you for legal advice. With reference to authority, advise Temba whether Mrs Nip can be arrested and charged with assault; whether the embassy premises can be searched for the paper weight which was allegedly used in the assault, and whether Temba can institute an action in a South African court claiming the remaining R25 000.00 from the Goldavian Government.

Unisa's Feedback

Assault

In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic.

Diplomatic premises and the the person of the diplomat (including his family) enjoy certain immunities:

• The diplomatic premises may not be entered by the host state without the permission of the ambassador.

• A diplomat may not be arrested or detained (it is a criminal offence to do so).

• Premises, furniture, property, cars, etc., may not be searched, requisitioned, attached or sold in execution.

• He/she is absolutely immune from criminal jurisdiction.

• Embassy archives, correspondence, post bags, etc., may not be opened, searched, detained.

• He/she is immune from civil jurisdiction unless: real action for immovable property held in personal capacity; matters of succession in private capacity; professional or commercial activities outside of official functions.

• This immunity extends to the diplomat's family, therefore Mrs Nip enjoys such immunity.

Contract with the Government

The provisions of FSIA apply here. This situation would fall under the commercial transaction exception to sovereign immunity.

If the restricted immunity theory is applied, the contract will be seen as a normal commercial transaction–in concluding the contract, Goldavia was not performing a public governmental function, but was merely acting as a trader in the marketplace. It would, therefore, not succeed in raising immunity and Temba would get his money.

Self-assessment

From a practical point of view, this learning unit is very important. Strydom's exposition is fairly detailed, and you are required to work through the work and ensure that you know and understand it. The following questions are in no way inclusive of the whole learning unit but will add to your understanding of the work.

(1) Mr Naughty, a South African, and Ms Pickpocket, a British national, have set up home together in Liverpool (England). In order to fi nance their lavish lifestyle, they have devised a profitable criminal scheme. They travel between England and South Africa, robbing their fellow passengers. Mr Naughty is caught stealing travellers' cheques from a fellow passenger on board a South African Airways fl ight between

London and Johannesburg. At the time of the theft, the aircraft is fl ying over Kenya. Ms Pickpocket, on the other hand, is caught stealing a pearl necklace from an old lady on a British passenger liner sailing between Southampton and Durban. At the time of the theft, the ship is on the high seas. Explain, referring to case law, whether a South African court will have jurisdiction over Mr Naughty and Ms Pickpocket, and, if so, on what basis.

(2) Write a legal opinion on universal jurisdiction, explaining its development, the controversies surrounding its application as well as the general principles, highlighted in the South African Constitutional Court's decision in National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre, that should be observed.

(3) Write an essay in which you summarise the basic features of the jurisdictional laws governing the specialist regimes of the sea, outer-space and Antarctica.

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